85-388 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally
incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether Section 8.01-35.1 (d) of the Code of Virginia violates the Due Process Clause of the United States Constitution by retroactively affecting a joint tortfeasor's statutorily created right of contribution?

2. Whether the Virginia Supreme Court can announce a new constitutional principal and apply it to the parties in this case?

3. Whether a joint tortfeasor who has claimed and accepted benefits under a statute should be estopped from claiming that the same statute is unconstitutional?

PARTIES

All parties below are shown in the caption of this petition. However, pursuant to Rule 28 (c), the Attorney General of the State of Virginia may be a party and 28 U.S.C. Section 2403 (b) may be applicable. A copy of this Petition will be served upon the Attorney General of the State of Virginia.

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v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Josephine A. Dillon, Committee of Hilda Nadine Amidon, a legally incompetent person, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Virginia Supreme Court entered in this proceeding on April 26, 1985. The Motion to Rehear was denied on June 14, 1985.

OPINIONS BELOW

The opinion of the Trial Court appears in the Appendix hereto. The opinion of the Supreme Court of Virginia can be found at 229 Va. , 329, S.E.2d 41 (1985). (See Appendix).

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on April 26, 1985. A timely Petition for Rehearing was denied on June 14, 1985 (See Appendix). This Petition for

Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

STATUTORY PROVISIONS INVOLVED

Section 8.01-35.1, Code of Virginia:

> Effect of release or covenant not to sue in respect to liability and contribution—A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> 1. It shall not discharge any of the other tortfeasors from liability for the injury, property damage or wrongful death unless its terms so provide,; but any amount recovered against the other tortfeasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and
>
> 2. It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
>
> B. A tortfeasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tortfeasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tortfeasor which is in excess of what was reasonable.
>
> C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of Section 8.01-55 and 8.01-424.
>
> D. *This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases*

executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued (emphasis mine).

STATEMENT OF THE CASE

On September 12, 1977, Amidon, a 54-year old woman, was admitted as a patient to Respondent Hospital for a medical workup for a D & C operation. She was operated upon on September 16, 1977. During the operation, Amidon sustained loss of oxygen to the brain which resulted in severe cerebral damage. She has been in a coma ever since that date. She has been in a nursing home, requiring 24-hour care, since 1978.

Petitioner sued William Moss ("Moss"), the Respondent Hospital's former administrator, James C. Kent, M.D., ("Dr. Kent"), Mehdi Jandaghi, M.D. ("Dr. Jandaghi"), Socorro Tamase, M.D. ("Dr. Tamase") and the Respondent Hospital, jointly and severally, for medical malpractice in connection with the operation performed on September 16, 1977. The Motion for Judgment was filed on January 8, 1980 in the Circuit Court of Prince William County, Virginia. Petitoner filed an amended Motion for Judgment on October 27, 1982. Dr. Tamase died on January 21, 1981, and her administrator, Darwyn H. Lesh ("Lesh"), was substituted as a party defendant. Moss was nonsuited by Order of the Trial Court entered on February 3, 1983.

Prior to trial on the merits, Dillon reached a settlement agreement with Dr. Kent, Dr. Jandaghi, and Lesh which she petitioned the Trial Court to ratify. Dillon prepared a document entitled "Consent Not To Sue Pursuant to Section 8.01-35.1 Code of Virginia" which released Dr. Kent, Dr. Jandaghi, and Lesh from all liability in return for a payment of $475,000. The Court entered an Order pursuant to Section 8.01-35.1, Code of Virginia (the covenant not to sue statute) dismissing Kent, Jandaghi and Lesh, but reserving the cause of action against the Respondent.

The Respondent filed a written Motion for Summary Judgment on August 10, 1983, which was heard on August 12, 1983. The Respondent Hospital argued that the right of

contribution is a "property right" which came about on September 16, 1977 (the date of the negligence) and that retroactive application of Va. Code Section 8.01-35.1 unconstitutionally destroyed this right. Therefore the Hospital argued, the case against them should be dismissed since, under Virginia law, prior to the enactment of the statute, a release of one joint tortfeasor released all joint tortfeasors.

The Trial Court reserved its ruling on the motion, and nine-day jury trial on the issue of the Hospital's liability ensued. The jury held that the Hospital was negligent and awarded damages of 1.2 million dollars. The Hospital renewed its Motion for Summary Judgment in writing on September 16, 1983. In this motion the Respondent argued that the statute's retroactive application deprived it of it's "vested" right of contribution. This motion was denied and the Trial Court set out its reasons for its denial of the Hospital's motion in a Memorandum Opinion (See Appendix).

The Trial Court ruled on December 16, 1983 that the Respondent's right to contribution is a inchoate rather than a vested right. Further, the Trial Court cited authority to the effect that inchoate rights are subject to retroactive alteration by Legislative dictate at any time prior to their vesting without violating the United States Constitution. Finally, the Trial Court held that the Virginia Legislature had not destroyed the Respondent's right to contribution but had "provided a new procedure for its enforcement". Therefore, Respondent's motion was denied.

Subsequently, after Respondent's Motion was overruled, Respondent argued that it was entitled to a credit of $475,000 against the jury verdict pursuant to the same statute. That Motion was granted, the verdict was accordingly reduced, and the Final Order was entered by the Trial Court on December 29, 1983.

The Respondent Hospital appealed in a timely fashion. On appeal, Respondent dropped the argument that the right of contribution was a "property right", and dropped the argument that the right of contribution was a "vested right". Instead, it merely argued to the Virginia Supreme Court that it was a

"substantive" right, and, as such, the legislature could not, by express intent, retroactively alter it. A majority of the Virginia Supreme Court held that subsection (d) of Section 8.01-35.1 violates the Due Process Clause of the Constitution by retroactively affecting the Respondent Hospital's "substantive right of contribution". The dissent held that since the Respondent claimed and accepted a $475,000 benefit conferred by the statute, it should be estopped from challenging that statute's constitutionality.

Petitioner timely filed a Motion to Rehear before the Virginia Supreme Court. The Petition to Rehear was denied by the Virginia Supreme Court on June 14, 1985. However, by Order dated August 22, 1985, the Virginia Supreme Court stayed execution of judgment until September 12, 1985, "unless the case has before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that Court." (See Appendix)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Sets Out An Erroneous Constitutional Standard That Has Never Been Accepted By Any State Court, Any Federal Appellate Court, Or This Court, And That Ignores Two Recent Decisions By This Court.

The Virginia Supreme Court in our case has pronounced that a legislative body, even with clear expression of its intent, cannot constitutionally enact a statute that retroactively alters a mere inchoate right. This is a principal of constitutional law that has never been accepted by any state court, by any federal appellate court, or by this Court. Further, such a constitutional proposition not only is contrary to traditional principals of law but also ignores the dictates of two decisions of this Court rendered in the last year. If this decision is allowed to stand, it will not only be grossly inequitable and unfair to Petitioner

herein, but it will also have a dire effect on the legislative function for years to come. A brief review of the inchoate right of contribution clearly shows how erroneous our decision is.

At common law there was no right to contribution between tortfeasors. The reason for the rule rested on considerations of sound public policy which disallowed a tortfeasor from "finding" an action as a result of his own wrongdoing. Vol. 18, *C.J.S., Contribution,* Section 11 (cases too numerous to cite).

The common law rule against contribution was abrogated in many states by the legislatures through the years. The legislatures recognized that it would unfair for one joint tortfeasor to shoulder the entire blame for a tort committed by several joint tortfeasors. The Virginia General Assembly by statute recognized a cause of action for contribution in 1919. *Nationwide Mutual Insurance Co., v. Jewel Tea Co.,* 202 Va. 527, 198 S.E.2d 646 (1961). It has remained a statutory cause of action in Virginia since that time.

On July 1, 1979, the Virginia General Assembly enacted Section 8.01-35.1 commonly known as the "covenant not to sue" statute. Virginia was the last state in the country to enact a "covenant not to sue" statute. The statute law did not "abolish" the right of contribution but did alter the method of computing contribution between tortfeasors *and* changed the old rule which was that a release of one of several joint tortfeasors operated as a release of all.

On April 1, 1982 the Virginia General Assembly amended the statute by adding subsection (d) which provides in pertinent part, that the statute shall apply to "covenants not to sue executed on or after July 1, 1979 . . . regardless of the date the causes of action affected thereby accrued."

The public policy reasons for the legislature enacting the statute was clearly recognized by the Virginia Supreme Court in *Hayman v. Patio Products, Inc.* 226 Va 482, 311 S.E.2d 752, at 755 (1984) wherein the Court held:

> "We believe the General Assembly intended to change a rule of law which tended to reward a

> recalcitrant tortfeasor at the expense of a joint tortfeasor who was willing to settle out of court." [1]

The *reason* for the change in the law is, of course, extremely important whenever a Court confronts a due process attack on retroactive legislation. In *Pension Benefit Guar. Corp. v. Gray*, ____U.S.____, 104 S.Ct. 2709 (1984) this Court, in a unanimous decision, employed a "rational means" test to a similar due process argument. The Court held that:

> "provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by *rational means*, the wisdom of such legislation *remains within the exclusive province of* the *legislative* and executive *branches* . . . The retroactive aspects of legislation, as well as the prospective aspects must meet the test of due process, and the justifications for the latter may not suffice for the former (citation omitted). *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.* 104 S.Ct. at 2718 (emphasis mine)." [2]

In a decision rendered by this Court on April 1, 1985, the *Pension Benefit* "rational means" test was employed on a due process attack involving the retroactive application of the Federal Land Policy and Management Act. In *U.S. v. Locke*, ____U.S.____, 105 S.Ct. 1785 (1985) this Court held that "retroactive application of (FLPMA) is supported by a legitimate legislative purpose furthered by rational means (citing

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[1] The statute encourages settlement. Public policy in Virginia and elsewhere favors settlement. Vol. 4A, Michies Jurisprudence, *Compromise and Settlement*, Section 4 (Supp. 1984). In fact, Chief Justice Burger has recently publically urged that the legal system find ways *to encourage settlements* of disputes to relieve our overcrowded court system. See A.B.A. Journal, August, 1985, p.33. The practical effect of the decision below is to discourage pre-trial settlement.

[2] Counsel for Petitioner sent to the Virginia Supreme Court copies of the *Pension Benefit* case and urged the Court, at oral argument and in its Petition to Rehear, to employ the "rational means" analysis in our case. The Virginia Supreme Court simply ignored the *Pension Benefit* case and it's "due process" analysis.

Pension Benefit)", therefore the due process challenge was denied. The Virginia Supreme Court completely ignored the "rational means" analysis in its decision without comment.

The Virginia Supreme Court did state that subsection (d) of the Covenant Not to Sue statute violated the due process rights of the Respondent.[3] The Court reversed the judgment of the trial court and entered final judgment for the Hospital. The decision not only announced an erroneous Constitutional principal that thwarted express legislative intent and ignored recent pronouncements of this Court, but the remedy employed served to completely free the Respondent Hospital of shouldering any blame whatsoever for a tort the Trial Court jury announced the Respondent should be held accountable for.[4] Their tort, as mentioned. left a patient in a comatose condition, yet *they* are

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[3] The Court cites as "authority" for that proposition dicta in *Shiflet v. Eller*, 227 Va. , 319 S.E.2d 750 (1984). *Shiflet* is a !984 Virginia Supreme Court case that did not involve any constitutional issue. It was purely a case of statutory construction that relied on Virginia's savings statute, Section 8.01-1.

Prior to our decision, with the sole exception of a Federal District Court case, *Carickhoff v. Badger Northland Inc.*, 562 F. Supp. 160 (W.D. Va 1983), no state or federal court anywhere has given a joint tortfeasor's right to contribution constitutional protection from retroactive alteration. *Carickhoff* wasn't even relied on or cited by the Court in our case. It was recently discussed, see *Comment, Release of Joint Tortfeasors: Virginia's Code Section 8.01-35.1 And Its Retoractive Application*, Vol. 18 U. Rich. L. Rev. 829, where the author examines the reasoning and authority cited in *Carickhoff*, and severely criticizes its holding. For contrary result, see: *Statzer v. King Kutter Corp.*, 550 F. Supp. 1062, 1065 (W.D. Va. 1982).

[4] For some reason the decision below never explicitly states which Constitution (State or Federal) that it relied on. However, it is clear that the decision relied upon the due process clause of the *Federal*, not State, Constitution. The trial court decision, which was the subject of the appeal below, decided the issue on the *Federal* Constitution only. Neither the trial court decision nor the Virginia Supreme Court decision discuss or even mention the State Constitution. Also, all cases cited in the *Shiflet* and *Dillon* cases that deal with the due process argument are grounded exclusively in the *Federal*, not State, Constitution.

In any event, in Virginia, the Supreme Court has held that if an activity does not offend the Federal Constitution, then it will not offend the Virginia Constitution, and vice versa. *Reynolds v. Milk Comm'n*, 163 Va 957, 963, 179 S.E. 507 (1935).

the ones who somehow enjoy a "due process right" springing from their very negligent act.

Clearly, even when applying standards prior to the *Pension Benefit* and *Locke* cases, subsection (d) is constitutionally sound. The law everywhere and in Virginia until our decision, is that the legislature possesses the power to enact retrospective legislation, without constitutional prohibition, if the legislative intent is plainly manifest that the statute is to have such effect and it neither impairs contractual obligations nor destroys vested rights. 16A Am Jur.2d., *Constitutional Law,* Section 663, 664, 668 (cases too numerous to cite).

This is especially true in a situation like ours where the affected right was created by the legislature in the first place. Vol. 18 C.J.S., *Contribution,* Section 2. *Sutherland,* in his national treatise on statutory construction, discusses the ability of the legislature to alter *statutorily created* inchoate rights. Such rights, *Sutherland* emphasizes, "are by definition *not* vested rights such as escape the common law rule" allowing a divestment of all rights "accruing under" the statute. Vol. 1A, *Sutherland, Treatise on Statutory Construction,* Section 23.35 and 33 (cases too numerous to cite).

Here, Section 8.01-35.1 (d) is supported by a legitimate legislative purpose (eg. encouraging settlement of claims) furthered by rational means under the *Pension Benefit* and *Locke* analysis. Also, using traditional Constitutional principals, the statute is sound. First, the manifest intent of the legislature is clearly stated in subsection (d) itself. Second, the right to contribution is clearly not a contractual right. Vol 18 C.J.S., *Contribution,* Section 2. Third, is it a vested right? This, of course, is the argument advanced by Respondent at the trial court level but later dropped on appeal. The reason for this change of argument is because every reported decision that has ever considered that argument has rejected it. A vested right is defined as a right not dependent on any future act, contingency or decision to make it more secure. The right to contribution is not vested. Rather it is "contingent, subordinate, or inchoate". *Shiflet,* supra, 319 S.E2d at 754. Finally, it is a right created by the legislative body and, therefore, is subject to the will of

the legislature prior to vesting. As such, it can be retroactively altered by legislative expression without constitutional prohibition.

Finally, there is language in the decision below that indicates the Virginia Supreme Court erroneously pinned its due process violation holding on the fact that the statute "retroactively . . . . eliminates the long standing common law defense that the release of one joint tortfeasor releases all." (See Appendix at 6A). Any suggestion that this change deprives Respondent of a constitutionally protected right is simply wrong. Clearly, the retroactive elimination of a common law defense creates no due process violation whatsoever. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978), this Court stated the long standing rule:

> **32.** Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976).

438 U.S. at 88 n.32.

Indeed, prior to the enactment of subsection (d) the Virginia General Assembly studied whether or not the covenant not to sue statute could retroactively affect a defendant's right of contribution. The Attorney General of Virginia, in a written opinion to a member of the General Assembly, concluded that retroactivity of Section 8.01-35.1 would be constitutionally permissible since ". . . such application would disturb no vested

rights and would be in accord with the rules of statutory construction." A.G. Rep. 247 (1979) (See Appendix).

Petitioner's position is neither novel nor new. Conversely, the Supreme Court of Virginia in our decision has announced a position that not only ignores the two recent decisions of this Court but would radically alter time-honored principles. The decision should be overturned and the jury verdict reinstated.

2. The Virginia Supreme Court Should Not Have Applied This New Constitutional Principal To The Parties In This Case.

The Virginia Supreme Court has carved out a new constitutional standard to be applied when the state legislative body, by express mandate, retroactively alters a statutorily created inchoate right. This new standard has resulted in extreme prejudice to Petitioner, e.g. the dismissal of a claim against a joint tortfeasor who chose not to settle but to have a jury determine liability. Where such prejudice exists this Court has stated many times that the Court which has declared a new constitutional standard has a duty to decide whether retroactive or prospective application of the new standard is appropriate. See, for example, *Chevron Oil Co. v. Huson*, 404 U.S. 97 30 L.Ed.2d 296, 92 S.Ct. 349 (1971); *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 2587, n. 12 (1982).

Petitioner advanced the argument to the Virginia Court that the remedy urged by Respondent (dismissal) would be inequitable and unjust to the parties herein. Also, after the announcement of the new constitutional standard, Petitioner timely filed its Petition to Reconsider based upon, amongst other things, the analysis the Court enunciated in *Chevron*. That Petition was denied without opinion.

This Court in *Chevron* related three factors that should control a Court's decision concerning whether to apply a new constitutional rule only to future cases. First, this Court directs that "the decision . . . must establish a new principle of law, either by overruling clear past precedents on which litigants may have relied . . . or by deciding an issue of first impression

whose resolution was not clearly foreshadowed . . ." *Id.* at 355 (citation omitted). Second, the Court must consider whether retroactive application will "further retard" the operation of the new rule. *Ibid.* Finally, the Court must weigh any "inequity" that would be imposed by retroactive application. *Ibid.*

Applying these factors, a court may elect one of several options, ranging from complete retroactivity of the new standard, to application only to cases still pending, to a rule of "pure" prospectivity that " 'denies the benefits of the new rule event to the parties before the Court.' " *In re Twin Parks Limited Partnership,* 720 F.2d 1374, 1376 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 1602 (1984) (quoting *United States v. Johnson, supra*).

When applying the *Chevron* criteria to our case, it is clear that a reversal and final judgment in favor of Respondent should not have been granted. First, the constitutional protection afforded statutorily created inchoate rights is a new principle of law whose resolution was certainly not clearly foreshadowed. As previously described, all cases, from Virginia and elsewhere, prior to the enactment of subsection (d) had consistently limited the constitutional protection of due process from retroactive alteration to vested not inchoate rights. Further, although the Court in our case refers to dicta in a 1984 Supreme Court case, that decision was rendered *after* Section 8.01-35.1 (d) was amended, *after* the parties executed a covenant not to sue, *after* the Trial Court denied the Respondent's Motion for Summary Judgment, *after* the trial of the non-settling defendant and during the pendency of our appeal.[5]

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[5] *Shiflet,* supra, only resolved an issue of statutory interpretation, not constitutional law. The covenant entered into in *Shiflet* pre-dated the express legislative intent for retroactivity found in sub-section (d). The constitutional issue was not even briefed in *Shiflet.* Specifically, that case held that the substantive right of contribution could not be *implicitly* retroactively impaired the 1979 version of Section 8.01-35.1 of the Virginia Code. Our factual context, unlike that in *Shiflet,* involved a covenant not to sue entered into eighteen months *after* the enactment of subsection (d)—the legislative expression giving the covenant not to sue statute retroactive effect. Considerations of due process were unnecessary to the decision in *Shiflet,* and the Court's comments about the limitations of due process were only dicta.

(footnote continues)

Continuing with the second factor of the *Chevron* analysis, the prospective application of the new constitutional protection statutes will not retard the operation of the new rule. By determining that the General Assembly did not have the legislative authority to retroactively alter inchoate, albeit substantive, rights of litigants by application of retroactive laws, the Virginia Supreme Court has now set a new and radically different legislative standard. It would not "retard" the new standard to apply it prospectively only. Indeed, prospectivity will provide the legislature and litigants with notice of the new standard so that the severe prejudice of unexpected dismissals, such as this, can be avoided.

Finally, when reviewing the equities of our situation, as *Chevron* directs, it is clear that the remedy afforded Respondent is inequitable and unjust. The Supreme Court of Virginia, after announcing its new constitutional principal, allowed the Respondent to escape any responsibility for its tort by applying the rule that release of one joint tortfeasor releases all. Thus, the claim against the Hospital was dismissed.

Employing the remedy of dismissal in this case is illogical. The "release of one releases all" rule was based upon the old English rule that a plaintiff could only obtain one judgment per tort, because the acts of one were considered to be the acts of all. Prosser, *Law of Torts*, Section 46 (4th Ed. 1971). However, because the fact that one joint tortfeasor was liable for *all* of the damage done, regardless of his degree of fault, there emerged the doctrine of contribution.

Therefore, with the Respondent enjoying the statutory right of contribution that a tortfeasor enjoys in Virginia, application of the "rule" is inequitable. The Respondent

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(footnote continued)

In any event, the "precedent" which the Court relied upon in *Shiflet* to elevate the right of contribution beyond its inchoate nature was adopted from a 1951 Delaware Superior Court case that has been overruled by that state's Supreme Court since 1958! See *Halifax Chick Express Inc. v. Young*, 137 A.2d 743 at 744-45 (Del. Supreme Ct. 1958) and *Perez v. Shortline, Inc.*, 231 A.2d 642 at 644 (Del. Superior Ct. 1967), overruling *Distefano v. Lamborn* 81 A.2d 675 (1951). The *Shiflet* decision cited *Distefano* but ignored the cases that overruled it.

should not be afforded the *benefit* of the "rule" because the *basis* for the rule (one joint tortfeasor is liable for all the damage done) simply doesn't exist under the covenant not to sue statute. Indeed, the Respondent requested and received from the trial court a credit of $475,000—the amount Petitioner settled for from the released joint tortfeasor.

For these reasons, the new rule announced in our case is not only unsound legally but it is also inequitable and unjust and should be treated "purely" prospectively. That is, the new constitutional standard should not apply to the parties in our case so as to allow Respondent to totally escape it's tortious conduct.

3. Since Respondent Claimed And Accepted Benefits Under Section 8.01-35.1, Code of Virginia, It Should Be Estopped From Claiming That Statute Is Unconstitutional.

As the dissent recognized in our case, the record below clearly shows Respondent took alternate positions in the Trial Court regarding the covenant not to sue statute. First, it claimed the statute was unconstitutional. This motion was overruled. Having been denied that relief, Respondent then argued that it was entitled to a credit of $475,000 against the verdict as provided by the same statute. This motion was granted. This Court long ago held that a litigant who takes advantage of the benefits conferred by a statute should not be heard to question its constitutionality in order to avoid its burdens. *Buck v. Kuykendall,* 267 U.S. 307 (1925).

The Respondent, by requesting and receiving its statutory right to contribution conferred by Section 8.01-35.1, to-wit: the $475,000 credit, has relinquished not only its ability to contest the constitutionality of the statute, but also it has given up any future right to contribution that it may have had prior to the statutes enactment. The Respondent has claimed the statutes benefit and, by the terms of Section 8.01-35.1 (2), it is precluded from seeking contribution from any other tortfeasor. To allow Respondent to accept the benefit of the statute, and not its burden, is contrary to settled law.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

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APPENDIX A

Record No. 840438

PRESENT: ALL THE JUSTICES
POTOMAC HOSPITAL CORPORATION

v.

JOSEPHINE A. DILLON, COMMITTEE
OF HILDA NADINE AMIDON

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

April 26, 1985

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

H. SELWYN SMITH, JUDGE

In 1982, the General Assembly amended Code § 8.01-35.1 [1] (the covenant-not-to-sue statute) by adding subsection D which provides that the statute "shall apply to all . . . covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued. Acts 1982, c. 196. The principal question in this appeal is whether this provision violates constitutional due process when retroactive application of the statute adversely affects a joint tort-feasor's substantive right of contribution.

[1] Code § 8.01-35.1 presently provides:

> Effect of release or convenant not to sue in respect to liability and contribution.—A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> 1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless

(footnote continues)

This is a medical malpractice case arising out of a surgical operation performed on Hilda Amidon at Potomac Hospital Corporation on September 16, 1977. During the operation, Amidon suffered a cardiac arrest and sustained severe, permanent brain damage.

In January 1980, Amidon's committee, Josephine Dillon, sued the hospital and three physicians, jointly and severally. On July 14, 1983, Dillon agreed to settle her claims against the physicians for $475,000. Pursuant to Code § 8.01-35.1, she executed a covenant not to sue, thereby releasing the physicians and purporting to reserve her claims against the hospital.

Before trial, the hospital moved for summary judgment on the ground that release of one joint tort-feasor releases all others. The hospital contended that because the cause of action accrued before the statute's effective date, application of Code § 8.01-35.1 to the cause of action unconstitutionally destroyed its right of contribution from the released tort-feasors.

(footnote continued)

its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whosse liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess of what was reasonable.

C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§ 801.55 and 8.01-424.

D. This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued.

The trial court reserved its ruling on the motion and a jury trial to determine liability and damages ensued. The hospital unsuccessfully moved to strike the evidence and enter summary judgment at the conclusion of Dillon's evidence and again after all the evidence was presented. The jury returned a $1,200,000 verdict for Dillon.

The trial court refused to set aside the verdict, but it did grant a $475,000 credit to the hospital for the amount the physicians had paid. The court entered judgment for $725,000 against the hospital. In rejecting the hospital's argument respecting the retroactive application of Code § 8.01-35.1, the court opined that the hospital's right to contribution was inchoate, not vested, and that "inchoate rights are subject to alteration or destruction by legislative enactment at any time prior to their vesting."

As a threshold issue, Dillon contends that the hospital is estopped from challenging the constitutionality of Code § 8.01-35.1 because it benefited from the statute by receving the $475,000 credit against the verdict. She relies upon *Bisping and Exum* v. *Commonwealth*, 218 Va. 753, 240 S.E.2d 656 (1978), *cert. denied*, 435 U.S. 1007 (1978), and *Spindel* v. *Jamison*, 199 Va. 954, 103 S.E.2d 205 (1958). Her reliance is misplaced.

In *Bisping*, the defendant voluntarily availed himself of the advantages of the recognizance statute and later claimed the statute was unconstitutional. We held that "one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens." *Bisping*, 218 Va. at 755, 240 S.E.2d at 657.

Similarly, in *Spindel*, the Plaintiff's application for a professional engineer's license pursuant to a specific statute was denied, and thereafter he attacked the statute's constitutionality. We said that "[n]o litigant will be heard to deny the validity of a statute under which he has chosen to proceed." *Spindel*, 199 Va. at 960, 103 S.E.2d at 210.

Here, however, the hospital did not request the application of Code § 8.01-35.1. To the contrary, it vigorously challenged

its application throughout the trial. After the court had rejected the hospital's contention and applied the statute, the credit provision of the statute automatically came into play. Consequently, we reject this contention.

Next, we address the constitutional question. The hospital contends, as it did at trial, that subsection D is unconstitutional. Relying primarily upon *Shiflet* v. *Eller,* 228 Va. 115, 319 S.E.2d 750 (1984), decided after the trial court ruled in the present case, it argues that the right of contribution by one joint tort-feasor from another is a "substantive" right which is "constitutionally protected against retroactive statutory abridgement."

On the other hand, Dillon asserts that Code § 8.01-35.1 can be retroactively applied in the instant case. She argues that a cause of action for contribution between joint tort-feasors is inchoate and contingent and that "[i]t ripens into a right to sue to recover only after one tortfeasor [sic] has paid a disproportionate share of damages arising out of a common obligation." She further asserts that Code § 8.01-35.1 merely altered the method of recovering contribution; it did not destroy the right of contribution.

Dillon acknowledges that the statue did not apply to causes of action arising before the date of its enactment because the General Assembly, in Code § 8.01-1,[2] expressly prohibited such application. She asserts, however, that by enacting subsection D of Code § 8.01-35.1, the General Assembly specifically expressed its intention to allow the statute's application

---

[2] Code § 8.01-1 reads as follows:

How proceedings may be in actions pending when title takes effect.—Except as may be otherwise provided in § 8.01-256 of Chapter 4 (§ 8.01-228 et seq.) (Limitations of Actions), all provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions; provided, however, that the applicable law in effect on the day before the effective date of the particular provisions shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice.

"regardless of the date the causes of action affected thereby accrued," thereby abrogating Code § 8.01-1. Dillon further asserts that the right of contribution, though substantive, is neither a vested nor a contractual right; thus, it can be altered retroactively without constitutional prohibition.

We conclude that *Shiflet* controls. In *Shiflet*, as here, the tort occurred in 1977, before the enactment of Code § 8.01-35.1, which took effect July 1, 1979. In a document executed in 1981, pursuant to Code § 8.01-35.1, the Shiflets released one joint tort-feasor but purported to reserve all claims against Eller, the other joint tort-feasor. When the Shiflets sued Eller, the trial court sustained Eller's plea of release, and we affirmed.

In *Shiflet*, we held that both "substantive" rights and "vested" rights "are included within those interests protected from retroactive application of statutes." 228 Va. at 120, 319 S.E.2d at 753. We further held that Eller's cause of action for contribution, which arose at the time of the tort,[3] "is a substantive right manifested by the ability of one tort-feasor to seek contribution from another wrongdoer jointly liable and by the ability of a joint wrongdoer to defend successfully a suit by the plaintiff after the plaintiff has released another joint tort-feasor." *Id.* at 121, 319 S.E.2d at 754.

Finally, in *Shiflet* we said what is most signficant to the present case:

> Because the cause of action for contribution accruing to Eller, a joint tort-feasor, arose at the time of the jointly negligent acts . . . , it necessarily follows that the 1979 statute in question, which adversely affects that substantive right, cannot be applied retroactively to impair that right . . . . Such a retroactive application of the enactment *would violate Eller's due process rights and would be invalid.*

---

[3] In *Shiflet*, we distinguished between a "cause of action" and a "right of action." The former "arises at the time of the jointly negligent acts" while the latter arises only when one joint tort-feasor has paid a claim for which other joint tort-feasors are also liable. *Id.* at 120-21, 319 S.E.2d at 754.

Id. at 121, 319 S.E.2d at 754 (emphasis added) (citations omitted). Thus, *Shiflet* holds that because the retroactive application of Code § 8.01-35.1 adversely affects the "substantive" right of contribution, such an application would violate a joint tort-feasor's due process rights. Additionally, such retroactive application of the statute eliminates the long-standing common-law defense that the release of one joint tort-feasor releases all.

Dillon seeks to distinguish the present case from *Shiflet*, noting that the release in *Shiflet* predated the enactment of subsection D of Code § 8.01-35.1, while in the present case, Dillon's covenant not to sue was executed after the enactment of subsection D. She asserts that *Shiflet* was controlled by Code § 8.01-1, but that subsection D abrogated Code § 8.01-1, thereby removing the prohibition against the statute's retroactive application. Dillon, however, ignores the language in *Shiflet* which clearly states that the retroactive application of a statute impairing a "substantive" right violates due process and is therefore unconstitutional. *Id.; see also Sargent Electric Co.* v. *Woodall*, 228 Va. 419, 425, 323 S.E.2d 102, 105 (1984).

Finally, Dillon contends that we should repeal the rule which provides that the release of one joint tort-feasor releases all. While acknowledging that this was the law in the Commonwealth before Code § 8.01-35.1, she asserts, nonetheless, that repeal is warranted because the rule is unjust and inequitable. We also reject this contention.

In *Wright* v. *Orlowski*, 218 Va. 115, 122-23, 235 S.E.2d 349, 354 (1977), we said: "Unfortunately, the rule sometimes works harsh results. Yet, the rule is one of ancient origin, honored without exception in this Commonwealth, and fully familiar to bench and bar. Both counsel and courts must be governed by it." Because this rule was established law at the time of the alleged malpractice when the rights and obligations of the parties were determined, *Shiflet*, 228 Va. at 123, 319 S.E.2d at 755; *Norfolk & Sou. R. Co.* v. *Beskin*, 140 Va. 744, 747, 125 S.E. 678, 679 (1924), it would be improper for us to retroactive repeal the rule under the guise of promoting equity. Unless litigants can rely upon established rules, there will be no stability in the law.

Thus, we hold that Code § 8.01-35.1 cannot be applied retroactively to adversely affect the hospital's right of contribution, and, therefore, pursuant to the established law at the time the cause of action accrued, the trial court erred in denying the hospital's motion for summary judgment. *See Wright* v. *Orlowski*, 218 Va. 115, 235 S.E.2d 349 (1977). Accordingly, we will reverse the judgment of the trial court and enter final judgment for the hospital.

Reversed and final judgment.

Record No. 840438

POTOMAC HOSPITAL CORPORATION

v.

JOSEPHINE A. DILLON, COMMITTEE
of HILDA NADINE AMIDON

RUSSELL, J., DISSENTING:

I think the hospital is estopped from challenging the constitutionality of Code § 8.01-35.1. As the majority opinion points out, one who claims and accepts the benefits conferred by a statute "will not be heard to question its constitutionality in order to avoid its burdens." *Bisping and Exum* v. *Commonwealth,* 218 Va. 753, 755, 240 S.E.2d 656, 657 *cert. denied,* 435 U.S. 1007 (1978); *Spindel* v. *Jamison,* 199 Va. 954, 960, 103 S.E.2d 205, 210 (1958). That is precisely the situation in which the hospital placed itself.

The majority opinion states that after the trial court had rejected the hospital's claim of unconstitutionality, the hospital did not invoke the benefits of the statute, so as to become estopped, because "the credit provision of the statute automatically came into play." I do not so interpret the record.

The hospital filed a post-trial motion, supported by a memorandum of law, moving the court (1) to reduce the $1,200,000.00 verdict to $750,000.00 pursuant to the statutory "cap" on malpractice awards provided by Code § 8.01-581.15, and (2) further to reduce the remaining $750,000.00 by $475,000.00 "pursuant to Va. Code § 8.01-35.1 (1983 Cum. Supp.)." In oral argument on the motion, counsel for the hospital said:

> Your Honor, you have a verdict of a million, two, which should be reduced to $750,000, because that's what the statue says is recoverable. And [8.01-] 35.1

> says that you should, from that amount that is to be recovered under [8.01-] 581.15, deduct $475,000, and leave the amount to be recovered $275,000, which means that the full effect of the statute is given . . . .

The court refused to apply the statutory "cap," but did apply Code § 8.01-35.1, the very statute the hospital attacks as unconstitutional, by granting the hospital's motion to the extent of crediting the $1,200,000 verdict with the $475,000 settlement the plaintiff had made with the physicians.

The hospital, therefore, specifically asked for and received the benefits conferred upon it by Code § 8.01-35.1 and, in my view, is estopped from any challenge to its constitutionality.

APPENDIX B

MEMORANDUM OPINION ISSUED BY THE TRIAL COURT DECEMBER 16, 1983

MEMORANDUM OPINION

SUBJECT: POTOMAC HOSPITAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT

This suit was brought by Josephine A. Dillon, Committee of Hilda Nadine Amidon, against Potomac Hospital Corporation, alleging negligence of the hospital, its agents and employees in rendering medical services to Miss Amidon. The events which gave rise to this suit occurred on or about September 16, 1977. Plaintiff filed her Amended Motion for Judgment on April 27, 1982. Named as defendants were Potomac, Dr. Mehdi Jandaghi, Dr. James Kent, Mr. William Moss and Darwyn H. Lesh, Administrator for the Estate of Dr. Soccoro Tamase. A non-suit was granted as to Mr. Moss, on July 14, 1983. Plaintiff, in consideration of $475,000, entered into a covenant not to sue with Dr. Jandaghi, Dr. Kent and Mr. Lesh. By the terms of that agreement, the named defendants, save for Potomac, were released from liability. On August 12, 1983, Potomac moved for summary judgment pursuant to Rule 3:18 Va. Rules of Court.

In its motion for summary judgment, Potomac contends that the covenant not to sue released Potomac as well as their co-defendants named therein. It is conceded by Potomac that enactment of Section 8.01-35.1 of the Code of Virginia in July of 1979, abrogated the common law doctrine, previously followed in Virginia, that release of one defendant released all. However, Potomac contends that the law to be applied in this case is the law as it existed on the day of Potomac's alleged negligence in 1977. To do otherwise would, in Potomac's opinion, destroy its right to contribution from the released defendants. This right, claims Potomac, cannot be taken away dispite subsection D of Section 8.01-35.1 which provides that the statute shall apply to all covenants not to sue and releases executed after its enactment "regardless of the date the causes of action affected thereby accrued."

In addition, Potomac is unwilling to concede that Section 8.01-35.1 was intended to change the prior rule that where an

employer's liability is based solely on the theory of respondent superior, release of the employee co-defendant releases the employer as well.

For the reasons set forth below, I find neither of Potomac's theories for non-application of Section 8.01-35.1 convincing.

In arguing that Section 8.01-35.1 should not be applied in the instant case, Potomac relies heavily on *Carickhoff* v. *Badges-Northland Inc.*, 562 F. Supp. 160 (W.D. Va. 1983). There Judge Michael ruled that application of Section 8.01-35.1 to a cause of action which arose prior to enactment of the statute would destroy the non-released defendant's pre-existing substantive right to contribution. According to Judge Michael this would constitute a deprivation of due process under the United States Constitution.

However, *Carickhoff* is only one of three opinions rendered to date on the retroactive application of Section 8.01-35.1. None of the opinions rendered are binding on this court, but it is worthy of note that the two other opinions on this point have upheld the constitutionality of applying Section 8.01-35.1 to a cause of action which arose prior to the statute's enactment. As plaintiff has pointed out, the Attorney General of Virginia gave an advisory opinion on this very point in May of 1979. He concluded that ". . . . such an application would disturb no vested rights and would be in accord with the rules of statutory construction." A.G. Rep. 247 (1979). In addition, it has been held that courts interpreting Section 8.01-35.1 and its amendments "must look to the date of the release rather than the date that the cause of action arose in order to determine the applicable statute." *Statzer* v. *King Kutter Corp.*, 550 F. Supp. 1062, 1065 (W.D. Va. 1982).

After reviewing these opinions and Potomac's contentions, I must respectfully disagree with the decision reached in *Carickhoff*. Initially, it is noted that all statutes are presumed constitutional and should be interpreted so as to comply with constitutional mandates. M. J. *Statutes* Section 56. While it is true that no statute may be applied retroactively if to do so would disturb contractual or vested property rights, "mere matters of procedure and remedy for their enforcement and

preservation may at the will of the Legislature be altered, curtailed or repealed so long as reasonable opportunity and time are afforded to enforce and preserve such rights." *Duffy* v. *Hartsock*, 187 Va. 406, 46 S.E.2d 570, 574 (Va. 1948). Also applied in *Stroobants* v. *State Highway Commissioner*, 209 Va. 275 (1968) and *Creteau* v. *Phoenix Assurance Co.*, 202 Va. 641 (1961).

The right asserted here, Potomac's right to contribution, was neither vested before enactment of Section 8.01-35.1 nor disturbed by that statute. It is well settled that before payment is actually made by one co-defendant, the right to contribution is an incohate rather than a vested right. *Nationwide Insurance Co.* v. *Minnifield*, 213 Va. 797, 799 (1973), 18 Am. Jur. 2d *Contribution* Section 46. It is equally well settled that incohate rights are subject to alteration or destruction by legislative enactment at any time prior to their vesting. *Turner* v. *Turner*, 185 Va. 505 (1946). This principle does not violate the United States Constitution. *Jackson* v. *National Linen Service Corp.*, 248 F. Supp. 962 (W.D.Va. 1965).

Furthermore, a careful reading of Section 8.01-35.1 reveals that the right to contribution, whatever its character, has not been disturbed. All that happened is that the Legislature had provided a new procedure for its enforcement. It is true that the statute specifically states in Subsection A-2 that a covenant not to sue or release "shall discharge the tort feasor to whom it is given from all liability for contribution to any other tort feasor." However, it is earlier stated in Subsection A-1 that "any amount recovered against the other tort feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release or in the amount of the consideration paid for it whichever is the greater."

Thus legislature has provided a more stream-lined method of computing contribution. Rather than having one tort feasor pay the plaintiff then seek contribution from fellow tort feasors, Section 8.01-35.1 simply allows the amount of the judgment to be reduced by what the plaintiff has already received as compensation. The policy behind the right to contribution is thereby preserved and no vested rights are impaired. While this method may alter the proportional share each tort feasor

will ultimately contribute, it has been held that statutes which merely alter the potential amount of recovery are not unconstitutional. *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164 (6th Cir. 1983).

Turning now to Potomac's second objection to applying Section 8.01-35.1 it contends that aside from the issue of retroactivity Section 8.01-35.1 should not be applied here because it was not meant to alter the common law rule that release of an employee releases the employer. In support of this contention Potomac cites authority from other jurisdictions which have interpreted statutes similar to Section 8.01-35.1. There is no Virginia case on point, however, in the case of *Harris v. Aluminum Company of America*, 550 F. Supp. 1024 (W.D. Va. 1983) Judge Turk confronted this issue. He held that "a covenant not to sue given to an alleged agent pursuant to Va. Code Section 8.01-35.1 does not automatically release the alleged principal from vicarious liability based on the acts of the alleged agent." 550 F. Supp. at 1030. Applying the "act's plain language" Judge Turk concluded that it "appears to apply to a party who is vicariously liable as the act's coverage extends to 'one of two or more persons liable in tort for the same injury.'" 550 F. Supp. at 1030. In addition, he found "no evidence that the Virginia General Assembly intended to exclude the vicarious liability of masters or principals from the scope of Virginia's covenant act." 550 F. Supp. at 1030.

I am persuaded by Judge Turk's reasoning and agree with him that Section 8.01-35.1 applies in cases of vicarious liability such as this.

Accordingly, Potomac's motion for summary judgment was denied.

H. SELWYN SMITH, Judge

APPENDIX C

Record No. 840438
Circuit Court No. L-10472

POTOMAC HOSPITAL CORPORATION,
Appellant,

against

JOSEPHINE A. DILLON, COMMITTEE, *etc.*,
Appellee.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 14th day of June, 1985.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 26th day of April, 1985, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

APPENDIX D

REPORT OF THE ATTORNEY GENERAL

STATUTES. RETROACTIVE APPLICATION. STATUTE PROVIDING THAT GIVING OF COVENANT NOT TO SUE DOES NOT DISCHARGE OTHER TORT FEASORS MAY BE APPLIED TO COVENANT EXECUTED AFTER EFFECTIVE DATE OF STATUTE BUT INVOLVING CLAIM FOR PERSONAL INJURY WHICH AROSE BEFORE THAT DATE.

May 29, 1979

The Honorable George E. Allen, Jr.
Member, House of Delegates

You ask about the retroactive application of a statute providing that the giving of a "covenant not to sue" does not discharge other tort feasors. The statute, § 8.01-35.1 of the Code of Virginia (1950), as amended,[1] was enacted by the General Assembly during its 1979 Session, to take effect July 1, 1979. You ask whether it would be applicable to a covenant not to sue executed after the effective date of the statute, July 1,

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[1] Section 8.01-35.1 provides the following:

"*Covenants not to sue and right to contribution.* A. When a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. It shall not discharge any of the other tort feasors from liability for the injury or wrongful death unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

2. It shall discharge the tort feasor to whom it is given from all liability for contribution to any other tort feasor.

B. A tort feasor who enters into a settlement with a claimant is not entitled to recover contributions from another tort feasor whose liability for the injury or wrongful death is not extinguished by the settlement, nor in respect to any amount paid in a settlement which is in excess of what was reasonable."

1979, and which involved a claim for personal injury arising out of an automobile collision which had occurred before that date.

I am of the opinion that the new statute would be applicable in the case you present since such an application would disturb no vested right and would be in accord with the rules of statutory construction.

This statute changes the existing law on two points. Presently, when a plaintiff effects an accord and satisfaction with one tort feasor, his claim against the others responsible for his injuries is also discharged—whether or not the plaintiff attempts to reserve the right to sue the others and whether the transaction is styled a covenant not to sue or a release. *Shortt v. Hudson Supply and Equipment Co.*, 191 Va. 306, 313, 60 S.E.2d 900, 904 (1950). The law also now provides that, "Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." *See* § 8.01-34. No special rule is provided for cases involving a covenant not to sue.

It is clear, of course, that retrospective application of the statute would not be allowed if it were to destroy or impair vested rights. This principle was clearly set forth in *Duffy v. Hartsock*, 187 Va. 406, 416, 46 S.E.2d 570, 574 (1948). In defining what is meant by the term "vested right," the court has said that it is "a right so fixed that it is not dependent on any future act, contingency or decision to make it more secure." *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37, 45, 124 S.E. 482, 484 (1924).

In the case of a covenant not to sue, it is the satisfaction of plaintiff's claim by a wrongdoer which extinguishes the liability of others responsible for the same injury—and not the form of the instrument. *Shortt, supra*, 191 Va. at 313. Therefore, until such time as satisfaction is actually made, the discharge of a tort feasor remains contingent upon a future event and cannot be considered vested. Consequently, the application of § 8.01-35.1 to a covenant executed after July 1, 1979, cannot be said to disturb any vested right of discharge—even where the covenant applies to a cause of action which arose before that date.

Likewise, the right of contribution arises only when one tort feasor has paid or settled a claim for which other wrongdoers are also liable. *Bartlett v. Roberts Recapping, Inc.*, 207 Va. 789, 793, 153 S.E.2d 193, 196 (1967). Until such payment or settlement has been made, the right of contribution remains a mere possibility, dependent upon a future contingency in order for it to vest. Therefore, if a covenant is not executed until after July 1, 1979, no right of contribution could accrue therefrom until after the effective date of the new legislation. Consequently, the application of the statute to convenants executed after that date would in no way disturb vested rights of contribution, regardless of when the cause of action arose.

I am also of the opinion that such an application of § 8.01-35.1 is in accord with the rules of statutory construction. In Virginia, it has been a generally accepted rule that "remedial statutes are not retrospective in their application in the absence of clear legislative intent." *Phipps, Adm'r* v. *Sutherland*, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959). Admittedly, no such intent was expressed by the General Assembly when it enacted § 8.01-35.1; but this point does not settle the question because the *Phipps* rule does not apply in every instance.

In *Walke* v. *Dallas, Inc.*, 209 Va. 32, 36, 162 S.E.2d 722, 724-725 (1968), the court stopped short of overrruling *Phipps*, but nevertheless decided that the long arm statutes then before it "are not the type to which the [Phipps] rule applies. They create no new cause of action and take away no existing right or remedy. They only provide a forum for asserting an existing right." In my opinion, § 8.01-35.1 is also the type of statute to which the *Phipps* rule does not apply. It is excluded from the operation of this rule for reasons similar to those for which the long arm statutes were excluded.

Like the long arm statutes, § 8.01-35.1 creates no new cause of action and takes away no existing rights. While the new law does not provide plaintiffs with a *new forum*, it nevertheless provides them with a *new method* by which they may pursue their claims. In both cases, the statutes only operate in furtherance of the remedy of rights already existing. It is my opinion that this degree of similarity with the long arm

statute is sufficient to include § 8.01-35.1 in the category of those statutes to which the *Phipps* rule does not apply.

I am also of the opinion that the application of the new statue to covenants executed after July 1, 1979, is not prevented by § 1-16. This section provides:

> "No new law shall be construed to repeal a former law, as to . . . any right accrued, or claim arising under the former law, or in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect; . . . "

It could be argued that the new statute would "affect" a personal injury claim arising before July 1, 1979, if it enabled that claim to survive a covenant which would otherwise discharge it. But the better view, in my opinion is that the new statute would not affect the claim itself, but would merely affect the covenant so as to alter the consequences which such a subsequent, collateral event would have upon the claim.

In support of this view, I would cite the court's decision in *Hurdle & Foelak* v. *Prinz & Meihm,* 218 Va. 134, 235 S.E.2d 354 (1977). In that case, personal injury causes of action accrued while the plaintiffs were still minors and before the operative date of the 1972 statute lowering the age of majority. The plaintiffs contended that, under §1-16, the law in force at the time their claims accrued controlled the date from which the statute of limitations commenced to run on their right to sue. Consequently, they argued, the new age of majority statute could not be applied so as to reduce the time within which their suits could be filed. The court rejected this view, declaring:

> "The statute affecting limitations here (citations omitted) are of the remedy only and procedural; the plaintiffs acquired no vested right therein at the time their causes of action accrued. Consequently . . . the portions of §1-16 relied on by the plaintiffs have no application to this case . . . ."

The implications of this decision are clear. In the *Hurdle* case, restricting the remedy by which plaintiffs' claims could be

pursued was not equivalent to affecting the claims themselves in violation of §1-16. Similarly, in the case you present, expanding to remedies available to a plaintiff in pursuing his claim must be distinguished from affecting the claim itself. Section 8.01-35.1 expands the remedy available in personal injury cases, but leaves the claim unaltered. Consequently, §1-16 is not relevant to the question you present.

For the foregoing reasons, I am of the opinion that § 8.01-35.1 would apply in personal injury cases to covenants executed after July 1, 1979, even where the cause of action arose before that date.